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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondents, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH, Respondent/Intervenors.	**REPLY MEMORANDUM SUPPORTING MOTION TO POSTPONE** Docket No. 2009-019 Cause No. C/025/0005 ORAL ARGUMENT REQUESTED

Alton Coal Development, LLC ("**Alton**" or "**ACD**"), the permittee of Coal Hollow Mine Permit No. C/025/0005 ("**Permit**"), through its attorneys, respectfully submits this Reply Memorandum in Support of its Motion before the Utah Board of Oil, Gas and Mining ("**Board**") to postpone any hearing on the *Petition for an Award of Costs and Expenses including Reasonable Attorney's Fees* (the "**Fee Petition**") filed by the Utah Chapter of the

Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Park Conservation Association (collectively, "**Petitioners**"). As set forth below, Petitioners have identified no compelling reason why the Board should prematurely exercise its discretion to hear their request for an award of fees in advance of a full and final resolution of their appeal now pending before the Utah Supreme Court. Accordingly, the more prudent course is to defer consideration of all attorneys' fee requests until the appeal is finally concluded and allow the Board to place all factors in proper perspective.

ARGUMENT

Petitioners have identified no provision of applicable law that mandates consideration of its request now, rather than after their pending appeal is resolved by the Utah Supreme Court. The manner and timing of the Board's consideration of the Fee Petition is a matter for the Board's discretion. In its motion to postpone consideration, Alton identified prudent and practical reasons to defer the consideration of Petitioners' demand. Petitioners' Reply offers no compelling reasons to consider its Fee Petition while the appeal is pending.

In their most recent memorandum, Petitioners oppose the suggestions of both Alton and the Division to postpone consideration of attorneys' fee requests. In their view, consideration of the current Fee Petition is proper because it presents a discrete issue regarding cultural resources that is now final. The rationale supporting this argument is that Petitioners have supposedly elected not to appeal the underlying issue dealing with the cultural and historic sites. Therefore, Petitioners maintain that considering this discrete fee request now is a simple and efficient means of resolving the Fee Petition compared to deferring any and all fee requests to a single proceeding when the appeal is final. No reasonable basis exists for this argument.

I.
INTENT TO NOT APPEAL ONE ASPECT OF ITS CULTURAL RESOURCE CHALLENGE DOES NOT JUSTIFY CONSIDERING AN AWARD OF FEES PRIOR TO FINAL RESOLUTION OF THE ENTIRE CASE

There are important legal reasons not to take at face value Petitioners' asserted finality of the underlying cultural resources issue as a basis for immediate review of their fee petition. The Petitioners claim that they do not intend to appeal the Division's determination of compliance regarding identification of cultural resources within the permit area and support this assertion with a copy of their docketing statement filed with the Utah Supreme Court. However, there are other cultural resource areas that are the subject of their pending appeal and no provision of law prevents Petitioners from raising their additional claims in briefs before the Supreme Court merely because it is omitted from the docketing statement. Utah R. App. P. 9(f); see Nelson v. Salt Lake City, 969 P.2d 568, 572 (Utah 1996) (holding that omission of an issue in a docketing statement has no preclusive effect). Therefore, Alton and the Division would be unwise to rely on this representation regarding Petitioners' appeal, and the Board would likewise be ill-advised to adjudicate a fee award on that basis. Regardless of whether Petitioners do or do not raise this specific issue on appeal, it is still so intertwined with their other arguments that the more prudent course is to wait and adjudicate all fee requests when the appeal is final as proposed in Alton's motion.

II.
CONSIDERATION AT THIS TIME WILL COMPLICATE, RATHER THAN SIMPLIFY, THE BOARD'S TASK OF DECIDING ENTITLEMENT TO FEES

The Board should reject Petitioners' request to adjudicate this separate fee award request isolated from the context of Petitioners' entire case, including other related cultural and historic resource claims. Even assuming that the appeal will unfold according to Petitioners' stated intentions, there is little wisdom, and some folly, in adjudicating this one

purportedly discrete request in a vacuum. The relevant statute governing attorneys' fee awards provides that costs and fees may be awarded to "either party" as the Board "deems proper." Utah Code § 40-10-23(f) (LexisNexis 2010); Section 40-10-23(f), Utah Coal Mining and Reclamation Act ("**UCMRA**"). The authority to award fees as the Board deems "proper" contemplates the Board's exercise of its equitable powers. See Utah Int'l Inc. v. Dep't of the Interior, 643 F.Supp. 810, 816, 826 (D.Utah 1986). However, in doing so, the Board is entitled to consider all of the surrounding facts and rulings to determine whether awarding fees, for any party, is proper under all circumstances. A hasty determination of the Petitioners' eligibility or entitlement to a fee, without full deliberation of all relevant factors, unwisely places false parameters around the Board's decision making authority and will likely lead to a result that will be the subject of a separate challenge.

Additionally, whether or not Petitioners' purported "success" comprises a discrete and finally-adjudicated issue, the Board's determination of both eligibility and entitlement to fees will be significantly influenced by the outcome of the pending appeal. Even when a statute such as UCMRA creates an opportunity for fee recovery, it is generally inappropriate to require a prevailing party to pay fees and costs of the losing party. See Utah Int'l Inc., 643 F.Supp. at 820 ("One of the notions behind those requirements is that it would be unjust to require that a successful party pay its adversary's fees.") While recognizing that a party may achieve less-than-complete success in its challenge, nonetheless the law provides that a party achieving some degree of success on the merits may receive a fee award. Id. Petitioners did not achieve any such level of success.

Petitioners prevailed on none of their claims against the Division and face a high bar to demonstrate that they achieved some success on the merits. They cannot base their claim

to a fee on a trivial or procedural victory. Rather the law requires a showing of a significant contribution toward ultimate resolution of the issue. See Ruckelshaus v. Sierra Club, 463 U.S. 680, 688 n.9 (1983) (Construing a similar fee-shifting provision in the Clean Air Act.) At hearing, Alton will contest the overall significance of Petitioners' contribution to the resolution of the cultural and historic resource claims.[1] The Board will be in a better position to evaluate the relative importance of Petitioners' claimed victory with the benefit of the Supreme Court's ruling on similar cultural resource claims relating to the adjacent area and the Panguitch National Historic District. Accordingly, Alton strongly suggests deferring consideration until that ruling is final.

III
THE BOARD SHOULD EVALUATE PETITIONERS' FEE REQUEST IN THE CONTEXT OF ALL OF THE COSTS OF THIS LITIGATION

As set forth above, because Petitioners lost on all seventeen of their claims in this matter, the Board must determine whether or not Petitioners' contribution was significant (i.e. neither trivial nor merely procedural) to evaluate whether Petitioners are eligible for the award requested. Beyond that, and if eligible, the Board must then decide whether Petitioners are entitled to the award.[2] Far from the mechanical accounting exercise proposed by Petitioners (see Petition For an Award of Costs and Expenses Including Reasonable Attorney Fees 5 (Dec. 21, 2010)) the question of entitlement is a factual inquiry also taking into account the significance of the legal work for which reimbursement is sought in light of

[1] Petitioners attempt to manufacture success from failure by narrowly defining the issue exclusively to the permit area. In determining success on the merits, or the significance of the Petitioners' contribution to the issues, Alton see no reason for the Board to be bound by the manner in which Petitioners chose to define the issues. Evaluating the importance of the purported success more broadly in the context of all cultural and historic resource claims will provide a more accurate assessment and is certainly within the Board's discretion.

[2] Alton will contest both eligibility and entitlement when the matter is properly before the Board. Alton identifies these issues now only for the purpose of illustrating that both determinations will be

the results obtained. See West Virginia Highlands Conservancy Inc. v. Norton, 343 F.3d 239, 247–49 (4th Cir. 2003).[3]

The Board's task is similar to that of the Interior Board of Land Appeals reviewed by the Fourth Circuit in WVHC v. Norton because UCMRA, like SMCRA, also commits to the Board's discretion the question of entitlement by an eligible party. While Alton sees nothing inherently wrong with using the IBLA's rules as factors in making the equitable judgment regarding entitlement, the Board's discretion is not so limited by state law. In its Motion to Postpone, Alton identified several factors that it believes the Board should consider to guide its equitable discretion in this matter. Among those factors are the Utah Supreme Court's view of the merits of related claims, and the amounts expended by other parties in reaching resolution of this matter. Given that no rule of law compels immediate consideration of Petitioners' request for fees based on its purported narrow victory, Alton suggests that it is the height of arrogance for the Petitioners to claim that amounts expended by the Division and Alton, the parties that prevailed on all seventeen issues, are irrelevant to the equity of Petitioners' requested award. Simple fairness, if nothing else, ought to guide the Board to evaluate Petitioners' entitlement to recover some of their fees in light of what has been spent by the prevailing parties. The Board should delay consideration of any fee petition until all those amounts are known to the Board.

CONCLUSION

The award of fees under UCMRA to any party "when proper" implicates the Board's equitable powers to reach a fair resolution in light of all factors it finds relevant. This

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informed by facts and rulings not presently available to the Board.

[3] WVHC v. Norton reviewed a decision of the Interior Board of Land Appeals, which applied the Secretary's rules at 43 C.F.R. 4.1294. The Fourth Circuit held that the entitlement question was one committed by law to the Secretary of the Interior, who subsequently promulgated the rules at part

decision involves a substantial exercise of discretionary powers, and Alton respectfully urges the Board to postpone a hearing on this and any other fee request until issuance of the Utah Supreme Court's final decision which will more fully inform the exercise of that discretion.

SUBMITTED this 16th day of February, 2011.

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4.1294 to guide that discretion. 343 F.3d at 248.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2011, I e-mailed a true and correct pdf copy of the foregoing **REPLY MEMORANDUM SUPPORTING MOTION TO POSTPONE** to the following:

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